HONG & FONG v. TAN PO LIN & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[CIVIL APPEAL NO: JA-12BNCVC-2-01-2021]
21 FEBRUARY 2022

Abstract – *The property developer's solicitors' conduct, in advising the purchasers to lodge a private caveat on one of the contra units purchased via contra transaction between the purchasers and the property developer was indicative that it had, in fact, acted for the purchasers in relation to the contra units, despite the fact that the purchasers did not pay the solicitors' legal fees. As the sole solicitors in the preparation of the sale and purchase agreement between the parties, the solicitors had not acted in accordance with common conveyancing practice when it failed to inform the purchasers that it was acting only on behalf of the property developer. Hence, the purchasers had, on a balance of probabilities, succeeded in its claim of professional negligence against the solicitors.*

LEGAL PROFESSION: *Negligence – Professional negligence – Solicitors – Solicitors appointed by developer for all sale and purchase transactions – Purchasers bought loan units and contra units – Purchasers discovered contra units encumbered via charge to bank and claimed damages against solicitors – Whether solicitors also acted for purchasers – Whether solicitors acted in accordance with common conveyancing practice – Admissibility of contra notes – Standard of care – Whether solicitors discharged evidential burden – Whether purchasers proved claim on balance of probabilities*

The plaintiffs, a married couple, entered into four sale and purchase agreements ('SPAs') for the purchase of four apartment units from one Goodwill Division Sdn Bhd ('Goodwill'). Each plaintiff purchased two units known as loan units and contra units. The SPAs for the loan units were dated March 2013 and March 2016 respectively; whilst the SPAs for the contra units were dated June 2013 and March 2016 respectively. The loan units were purchased by the plaintiffs respectively through a bank loan. The contra units, however, were a result of an arrangement between the second plaintiff, as the managing director of South Johor Steel Sdn Bhd ('South Johor') and Thong Moi Keong, as the managing director of Goodwill. The contra units were offered to the plaintiffs in consideration for supply of steel from South Johor to Goodwill. The defendant was appointed by Goodwill for all the transactions. The plaintiffs paid legal fees to the defendant for the transactions pertaining to the loan units but not for the contra units. In September 2016, vacant possession was granted for the contra units, which

were then sold by the plaintiffs to third parties. However, it was discovered that the contra units were encumbered *via* a charge to Sabah Development Bank Berhad ('Sabah Bank'). The plaintiffs had to eventually pay a sum of RM261,126.25 to redeem the contra units from Sabah Bank. The plaintiffs brought an action against the defendant for professional negligence. The Sessions Court Judge allowed the plaintiffs' claim and as a result, the defendant appealed to this court. The issues that arose were (i) whether the contra notes were admissible; (ii) whether the defendant was the solicitors for the plaintiffs in relation to the contra units as the defendant was never appointed to act for them; (iii) whether the plaintiffs failed to establish the standard of care imposed on the defendant and whether such standard had been met; and (iv) whether the defendant had discharged its evidential burden.

Held (dismissing appeal with costs):

(1) At the Sessions Court, the defendant had challenged the contra notes relied upon by the plaintiffs to prove their claim. The challenge was mounted on the basis that the contra notes were approved by Thong Moi Keong, who had since passed away. Since the maker of the contra notes, which were produced in its original form, had passed away, the requirement of s. 73A(1) of the Evidence Act 1950 ('Evidence Act') which deals specifically with documentary evidence in civil cases, had been fulfilled. The Sessions Court was correct in marking the contra notes as exhibits and admitting them under s. 73A of the Evidence Act. (paras 7-9)

(2) The plaintiffs had not paid the defendant's legal fees with regard to the transaction for the contra units due to the fact that the contra units were purchased *via* a contra transaction, and as such, it was reasonable to expect Goodwill to have handled payment of the defendant's legal fees for the contra units SPAs. The defendant's conduct also indicated that it had, in fact, acted for the plaintiffs in relation to the contra units. For instance, although s. 84 of the Legal Profession Act 1976 stipulates that an advocate and solicitor acting for the developer should not act for the purchaser in a housing development, in the present case, the defendant was the sole solicitor in the preparation of the SPAs for the contra units, and in accordance with common conveyancing practice, the defendant should have informed the plaintiffs that it was, as alleged, acting only on behalf of Goodwill, but it never did. Since the terms of the loan units were identical to the contra units and that the defendant had acted accordingly with regard to the loan units, there was no reason for the defendant to have omitted to carry out its duties in relation to the contra units, as reasonable advocates and solicitors would have done. Furthermore, if the defendant had not acted for the plaintiffs in relation

to the contra units, it then begged the question why it had advised the plaintiffs to lodge a private caveat on one of the contra units. As such, it was beyond doubt that the defendant was acting as solicitors for the plaintiffs in relation to both the loan and contra units. (paras 13, 17, 18 & 19)

(3) The issue of the standard of care of the defendant was not put to the plaintiffs' witnesses during cross-examination. It is trite law that a litigant's case must be expressly put to his opponent's witnesses during cross-examination, failing which, this would disentitle the defendant from raising such argument. Since this point was never raised at the Sessions Court, it would be disingenuous for the defendant to raise it at this stage. However, in the interest of completeness, the present case involved an uncomplicated matter. According to usual and standard conveyancing practice, all that the defendant had to do was to conduct the necessary investigation as to whether the contra units were still encumbered at the time of the delivery of the vacant possession in accordance with the SPAs for the contra units; and subsequently, to advise the plaintiffs regarding the redemption sum of a total sum of RM261,126.25 which was to be paid to Sabah Bank. That was exactly what the defendant had done with regard to the loan units. There was, therefore, no excuse for the defendant's failure to act accordingly with regard to the contra units. (paras 21, 22, 28 & 29)

(4) Although it was the plaintiffs who had to prove their case on a balance of probabilities, this did not mean that the defendant could escape liability by not adducing any evidence whatsoever. The defendant had the evidential burden to raise sufficient evidence. Since the threshold that the plaintiffs had to reach was a balance of probabilities, this meant that the defendant had to at least ensure that the probabilities were equal. However, the only witness that the defendant had adduced was SD1, whose evidence was not sufficient for the defendant to ensure that the probabilities were equal. In the final analysis, by not calling witnesses who could have assisted the defendant in its averments, the defendant had run the risk of having failed to discharge its evidential burden to ensure that the probabilities were at least equal. The plaintiffs had, in fact, tipped the scales in their favour, and as such, had proved their claim on a balance of probabilities. (paras 38 & 39)

Case(s) referred to:

Aik Ming (M) Sdn Bhd. & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Hijau Biru Envirotech Sdn Bhd v. Tetuan Dzahara & Associates & Ors [2021] 1 CLJ 186 CA ***(refd)***

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***

A *Inas Faiqah Mohd Helmi (An Infant Suing Through Her Father And Next Friend, Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC* ***(refd)***
Kam Pau Siong & Anor v. Wilayah Fabrication Sdn Bhd & Ors [2004] 2 CLJ 816 CA ***(refd)***
Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***
Maheswari Eliathamby & Anor v. Koperasi Serbaguna Kebangsaan Bhd & Ors [2018] 1 LNS 1211 CA ***(refd)***
B *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC* ***(refd)***
MGI Securities Sdn Bhd v. Teong Teck Leng & Ors [2000] 5 CLJ 163 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82 CA ***(refd)***
C *R v. Turner [1975] 1 All ER 70* ***(refd)***
Re B [2008] UKHL 35 ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(dist)***
D *Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors [2020] 1 LNS 2123 CA* ***(refd)***
U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC ***(refd)***
Unsung Rasad v. PP [2019] 1 LNS 662 CA ***(refd)***
Victor Cham & Anor v. Loh Bee Tuan [2006] 3 CLJ 770 CA ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***

E **Legislation referred to:**
Evidence Act 1950, ss. 17, 18, 21, 73A(1), 101, 102, 114(g)
Legal Profession Act 1976, s. 84
Rules of Court 2012, O. 40A r. 2(1)

For the appellant/defendant - Loh Chu Bian, Lee Wei Ting & Yong Veng Loc; M/s Loh
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[Editor's note: Appeal from Sessions Court; Writ No: JA-A52NCVC-176-06-2019.]

G *Reported by Suhainah Wahiduddin*

JUDGMENT

Evrol Mariette Peters JC:

H **Introduction**

[1] This was an appeal against the decision of the learned Sessions Court Judge ("SCJ") delivered on 21 January 2021, in allowing the respondents' claim against the appellant for, *inter alia*, a sum of RM261,126.25. For ease of reference, the appellant and respondents will be referred to respectively
I as the defendant and plaintiffs.

The Factual Background

[2] The plaintiffs, a married couple, entered into four sale and purchase agreements ("SPAs") for the purchase of four apartment units from one Goodwill Division Sdn Bhd ("Goodwill"). Each plaintiff purchased two units known as loan units and contra units. The SPAs for the loan units were dated March 2013 and March 2016 respectively; whilst the SPAs for the contra units were dated June 2013 and March 2016 respectively.

[3] The loan units were purchased by the plaintiffs respectively through a bank loan. The contra units, however, were a result of an arrangement between the second plaintiff, as the managing director of South Johor Steel Sdn Bhd ("South Johor") and Thong Moi Keong, as the managing director of Goodwill. The contra units were offered to the plaintiffs in consideration for supply of steel from South Johor to Goodwill.

[4] The defendant was appointed by Goodwill for all the transactions. The plaintiffs paid legal fees to the defendant for the transactions pertaining to the loan units but not for the contra units.

[5] In September 2016, vacant possession was granted for the contra units, which were then sold by the plaintiffs to third parties. However, it was discovered that the contra units were encumbered *via* a charge to Sabah Development Bank Berhad ("Sabah Bank"). The plaintiffs had to eventually pay a sum of RM261,126.25 to redeem the contra units from Sabah Bank.

[6] The plaintiffs brought an action against the defendant for professional negligence. The learned SCJ allowed the plaintiffs' claim and as a result thereof, the defendant appealed to this court ("this appeal"). This appeal was dismissed for the following reasons.

Contentions, Evaluation And findings

Whether The Contra Notes Were Admissible

[7] At the Sessions Court, the defendant had challenged the contra notes which were relied upon by the plaintiffs to prove their claim. The challenge was mounted on the basis that the contra notes were approved by Thong Moi Keong, who had since passed away.

[8] At this juncture, it is important to bear in mind that the learned SCJ had considered s. 73A(1) of the Evidence Act 1950 ("Evidence Act"), which deals specifically with documentary evidence in civil cases. The provision reads:

> Section 73A – Admissibility of documentary evidence in civil cases, etc.
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, **on production of the original document**, be admissible as evidence of that fact if the following conditions are satisfied:

A (a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement
B (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

C (b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend
D as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(emphasis added)

[9] Since the maker of the contra notes, which were produced in its
E original form, had passed away, the requirements of s. 73A(1) of the Evidence Act had been fulfilled, and as such, the learned SCJ was correct in marking the contra notes as exhibits and admitting them under s. 73A of the Evidence Act.

Whether The Defendant Was Common Solicitors

F

[10] The whole slant of the defence was that the defendant was not the solicitors for the plaintiffs in relation to the contra units, as the defendant firm was never appointed to act for them. This was the defendant's emphasis at the Sessions Court.

G **[11]** The defendant submitted that it was not retained to act as the solicitors for the plaintiffs in respect of the contra units on the grounds that there was no express written or oral retainer and that no payments were made by the plaintiffs in respect of the defendant's fees pertaining to the contra units. The defendant had also submitted that it had never advised nor had
H communicated with the plaintiffs with regard to the contra units.

[12] Although there was no express retainer, a solicitor-client relationship may be implied from the conduct of the parties and the circumstances of the case. This was explained in several cases including *Victor Cham & Anor v. Loh Bee Tuan* [2006] 3 CLJ 770; [2006] 5 MLJ 359 and *Messrs Yong & Co v. Wee*
I *Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep)

251. In *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251, it was stated by Syed Agil Barakbah FJ in the following passages:

> In our view, there was ample evidence on record for the learned Judge to conclude that a retainer came into existence by implication and as amplified by the **conduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client**. (*Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1978] 3 All ER 571).
>
> (emphasis added)

[13] With regard to the present case, the plaintiffs had not paid the defendant's legal fees with regard to the transaction for the contra units. This, the plaintiffs explained, was due to the fact that the contra units were purchased *via* a contra transaction, and as such, it was reasonable to expect Goodwill to have handled payment of the defendant's legal fees for the contra units SPAs.

[14] In any event, a very telling fact was that two admissions were made by the defendant regarding its role pertaining to the contra units. The first was through one Muhammad Izwan Aziz bin Md Said who had written on behalf of the defendant to the plaintiffs' solicitors, *via* letter dated 27 May 2019, the relevant part of, which reads (*in verbatim*):

> 2. We strictly deny paragraph 3, 9 and 10 of the said letter. However, **we did acted for both Developer and your clients** in respect of preparation the above Sale and Purchase Agreement.
>
> (emphasis added)

[15] It is trite law that an admission is admissible under ss. 17, 18 and 21 of the Evidence Act, and is a strong piece of evidence in support of the plaintiffs' claim. Reference on this point was made to the Court of Appeal case of *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450.

[16] The second admission was made by the defendant's own witness, one Yap Foong Ling, a former director of Goodwill ("SD1") who, during the trial, testified that the defendant was indeed acting for the plaintiffs for the contra units.

[17] In addition to these admissions, the circumstances, including the defendant's conduct were also indicative that it had, in fact, acted for the plaintiffs in relation to the contra units. For instance, although s. 84 of the Legal Profession Act 1976 stipulates that an advocate and solicitor acting for the developer should not act for the purchaser in housing development, in the present case, the defendant was the sole solicitor in the preparation of the SPAs for the contra units, and in accordance with common conveyancing

practice, the defendant should have informed the plaintiffs that it was, as alleged, acting only on behalf of Goodwill, but it never did. Such common conveyancing practice was referred to in a plethora of cases including *Victor Cham & Anor v. Loh Bee Tuan* [2006] 3 CLJ 770; [2006] 5 MLJ 359, *Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors* [2020] 1 LNS 2123.

[18] Since the terms of the loan units were identical to the contra units and that the defendant had acted accordingly with regard to the loan units, there was no reason for the defendant to have omitted to carry out its duties in relation to the contra units, as reasonable advocates and solicitors would have done. Furthermore, if the defendant had not acted for the plaintiffs in relation to the contra units, it then begs the question why it had advised the plaintiffs to lodge a private caveat on one of the contra units.

[19] As such, it was beyond doubt that the defendant was acting as solicitor for the plaintiffs in relation to both the loan and contra units.

Whether The Standard Of Care Had Been Established/Met

[20] Although the gist of the defence was that the defendant was not the solicitors for the plaintiffs, in this appeal, however, the emphasis of the defendant was that the plaintiffs had failed to establish the standard of care imposed on the defendant and whether such standard had been met.

[21] First and foremost, the issue of the standard of care of the defendant was not put to the plaintiffs' witnesses during cross-examination. It is trite law that a litigant's case must be expressly put to his opponent's witnesses during cross-examination, failing which, this would disentitle the defendant from raising such argument. This principle was emphatically stated by Gopal Sri Ram JCA (as he then was), in the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770, in the following passage:

> ... **It is essential that a party's case be expressly put** to his opponent's material witnesses when they are under cross-examination. A **failure in this respect may be treated as an abandonment of the pleaded case and if a party**, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.
>
> (emphasis added)

[22] I have to, therefore, agree with the plaintiffs that since this point was never raised at the Sessions Court, it would be disingenuous for the defendant to raise it at this stage. In any event, in the interest of completeness, I proceeded to consider this issue.

[23] In its submission, the defendant relied heavily on the cases of *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486 and *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat*

& Anor [2017] 6 CLJ 368; [2017] 4 MLJ 207, to contend that the plaintiffs had failed to call an expert to testify as to the standard of care that is expected of an advocate and solicitor, which the plaintiffs had failed to do.

[24] In my view, the authorities relied on by the defendant are distinguishable as it has been established by a plethora of cases, including *Hijau Biru Envirotech Sdn Bhd v. Tetuan Dzahara & Associates & Ors* [2021] 1 CLJ 186; [2020] 5 MLJ 549 and *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal* [2020] 5 CLJ 82; [2020] 4 MLJ 380, that 'the failure to call an expert to testify as to the standard of care that is expected of an advocate and solicitor is not fatal in every case of professional negligence against an advocate and solicitor, and that it would depend on the facts of the individual cases. The question that needed to be addressed by the court, therefore, was whether the opinion evidence of an expert was required in the first place to assist this court.

[25] At this juncture, it was vital to understand the role of the expert. Pursuant to O. 40A r. 2(1) of the Rules of Court 2012 ("Rules of Court"), the role of the expert is merely to assist the court on matters within his expertise. The provision reads:

> Order 40A - Experts of parties
>
> Rule 2 - Expert's duty to Court
>
> (1) It is the duty of an expert **to assist the Court** on the matters within his expertise.
>
> (emphasis added)

[26] I was guided also by the following observations of Raja Azlan Shah CJ (as he then was) in *Wong Swee Chin v. PP* [1980] 1 LNS 138, on the role of the expert:

> Our system of jurisprudence does not, generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. **But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments**. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.
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> (emphasis added)

[27] The court's attention was also brought to the oft-quoted passage of Lawton LJ in the English case of *R v. Turner* [1975] 1 All ER 70, which was referred to and cited by Abang Iskandar Abang Hashim JCA (as he then was)

in the Court of Appeal case of *Maheswari Eliathamby & Anor v. Koperasi Serbaguna Kebangsaan Bhd & Ors* [2018] 1 LNS 1211; [2019] 1 MLJ 440, in the following passage:

> The law was emphatically stated by Lawton LJ in the English case of *R v. Turner* [1975] 1 All ER 70 at p. 74 where he said: "The foundation of these rules was laid by Lord Mansfield CJ in *Folkes v. Chadd* [1782] 3 Doug KB 157 at 159 and was well laid: The opinion of scientific men upon proven facts", he said, "may be given by men of science within their own science." *An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary*.
>
> This *Turner*'s case (*supra*) was followed in the Singapore case of *Chou Kooi Peng & Anor v. PP* [1998] 3 SLR 593. See also the case of *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368; [1984] 2 MLJ 19 (FC). *In essence what this means is that expert evidence is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the presiding judge*.
>
> (emphasis added)

[28] In the cases relied upon by the defendant, the matters in question were not straightforward ones, and hence the assistance of experts was imperative. The present case, however, involved an uncomplicated matter. According to usual and standard conveyancing practice, all the defendant had to do was to conduct the necessary investigation as to whether the contra units were still encumbered at the time of the delivery of the vacant possession in accordance with the SPAs for the contra units; and subsequently to advise the plaintiffs regarding the redemption sum of a total sum of RM261,126.25 which has to be paid to Sabah Bank. This was pursuant to cl. 2(3) of the SPAs for the contra units, which reads:

> Parcel free from encumbrances before the Purchaser takes vacant possession of the said Parcel
>
> 2(3) In the event the said land shall be encumbered to any bank and/ or financial institution by the Vendor, the Vendor shall immediately after the date of this Agreement deliver or cause to be delivered to the Purchaser and/or the Financier (as hereinafter defined) a copy of the redemption statement and undertaking letter issued by such bank and or financial institution in respect of the said Parcel and shall authorize the Purchaser to pay such portion of the purchase price or the Financier to release such portion of the Loan, as the case may be, equivalent to the amount of the redemption sum payable in respect of the said Parcel directly to such bank and/ or financial institution and thereafter the balance purchase price or the balance Loan to the Vendor provided all such payments and releases are made progressively at the time and in the manner prescribed in the Third Schedule.

[29] In fact, that was exactly what the defendant had done with regard to the loan units. There was, therefore, no excuse for the defendant's failure to act accordingly with regard to the contra units.

Whether Defendant Had Discharged Its Evidential Burden

[30] It was undisputed that the defendant had called only one witness who was the Goodwill's former director to give evidence. As a result of which, the learned SCJ had drawn an adverse inference against the defendant. The defendant argued that there was no basis to do so bearing in mind that it was the plaintiffs who had the legal burden to prove the case on a balance of probability.

[31] It is trite law that the plaintiffs had the legal burden of proof, as prescribed by ss. 101 and 102 of the Evidence Act 1950 ("Evidence Act") which read:

> Section 101 – Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> Section 102 – On whom burden of proof lies
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[32] Both ss. 101 and 102 of the Evidence Act were referred to in *MGI Securities Sdn Bhd v. Teong Teck Leng & Ors* [2000] 5 CLJ 163; [2000] 1 MLJ 354, by KL Rekhraj J in the following passage:

> … sections 101 and 102 of the Evidence Act 1950 require 'whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove those facts do exist'; and here the plaintiff having chosen and elected not to lead the evidence of the oral agreements through its witnesses, the court could only hold that there was no evidence of the plaintiff's before the court to adjudicate upon; and accordingly dismissed the plaintiff's claim with costs.

[33] I found instructive also the Federal Court case of *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580, and the Court of Appeal case of *Kam Pau Siong & Anor v. Wilayah Fabrication Sdn Bhd & Ors* [2004] 2 CLJ 816; [2004] 3 MLJ 599, on the interpretation of ss. 101 and 102 of the Evidence Act.

[34] The reminder on who has the burden to prove was administered by the Federal Court in *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491 and *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151, where in the latter case, it was stated by Ong CJ in the following passage:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

[35] It was further emphasised in the case of *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491, by Arifin Zakaria CJ, in the following passage:

> It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (section 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

[36] The standard of proof on the plaintiffs to prove their claim was on a balance of probabilities, a term which was described in *Miller v. Minister of Pensions* [1947] 2 All ER 372 by Denning J (as he then was) as 'more probable than not' and which is 'not so high as required in a criminal case ... but if the probabilities are equal, it is not discharged'. *Miller v. Minister of Pensions* has been assimilated into Malaysian jurisprudence through several cases including *Inas Faiqah Mohd Helmi (an Infant Suing Through Her Father And Next Friend, Mohd Helmi Bin Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1.

[37] The concept of balance of probabilities was further explained in *Unsung Rasad v. PP* [2019] 1 LNS 662, in which Abang Iskandar Abang Hashim JCA (as he then was), in adopting the English case of *Re B* [2008] UKHL 35, stated in the following passage:

> In the celebrated case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:
>
> > If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.
>
> [17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, **to reach a level of proof of at least 51% probability against his adverse party**. We would cite the English

case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgement entered in his favour, like so:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. *If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*.
>
> (emphasis added)

[38] Although it was the plaintiffs who had to prove their case on a balance of probabilities, this did not mean that the defendant could escape liability by not adducing any evidence whatsoever. The defendant had the evidential burden to raise sufficient evidence. Since the threshold that the plaintiffs had to reach was a balance of probabilities, this meant that the defendant had to at least ensure that the probabilities were equal. However, the only witness that the defendant had adduced was SD1, whose evidence was not sufficient for the defendant to ensure that the probabilities were equal. Therefore, even if I agreed with the defendant that s. 114(g) of the Evidence Act should not have been invoked, in the final analysis, by not calling witnesses who could have assisted the defendant in its averments, the defendant had run the risk of having failed to discharge its evidential burden to ensure that the probabilities were at least equal.

[39] In the final analysis and on the totality of the evidence, the plaintiffs had, in fact, tipped the scales in their favour and as such, had proved their claim on a balance of probabilities.

Conclusion

[40] In the upshot, therefore, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including the written and oral submissions of both parties, and the grounds of judgment of the learned SCJ, I found no error in the decision of the learned SCJ which warranted interference. Hence, this appeal was dismissed with costs.